No. 98-1940

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ELIZABETH JEANNE PITTMAN, a minor under 18 years of age by Frederick Pittman her father and legal custodian and FREDERICK PITTMAN, individually,

Petitioners,

—v.—

ICELANDAIR, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should review the decision of the Court of Appeals affirming the District Court's holding that petitioners failed to present sufficient evidence to establish respondent's liability under a state law theory of "tortious interference with parental rights" when no federal question was raised below and the case has no significance beyond the private interests of the parties?

Parties to the Proceeding

The Petition accurately sets forth the parties to the proceeding.

Corporate Listing Statement Required By Supreme Court Rule 29.6

Icelandair does not have any parent companies, subsidiaries or affiliates that have issued shares to the public.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Icelandair respectfully requests that the Court deny the Petition which seeks review of the opinion and decision of the Court of Appeals for the Second Circuit affirming the District Court's entry of judgment as a matter of law because petitioners failed to submit sufficient evidence to establish their state law causes of action. The Second Circuit opinion is reported at 149 F.3d 111 (1998) and is reprinted in the Appendix to the Petition.[1]

[1] References to the Petition appear as "Pet."; references to the Appendix to the Petition appear as "Pet. __a"; references to the Trial Transcript appear as "Tr."

STATEMENT OF THE CASE

A. Nature of the Case

This case arises out of a parental kidnapping when petitioner Fred Pittman's ex-wife, Mrs. Erna Pittman Grayson a/k/a Erna Eyjolfsdottir (hereinafter "Erna" or "Erna Pittman"), took their daughter, Elizabeth, to Iceland in violation of Fred Pittman's joint custody rights.

Fred Pittman brought this action against Erna and certain other defendants claiming that they participated in a complex conspiracy to spirit away his daughter. Fred Pittman claimed that the conspirators were: (1) Erna Pittman, Elizabeth's mother, his ex-wife, the alleged principal actor in the abduction; (2) Mr. Helgi Hilmarsson, Erna's boyfriend at the time of the abduction and an alleged co-abductor; (3) Mr. Gudmundur Karl Jonsson, Erna's stepfather, an alleged co-conspirator who Fred Pittman claims arranged Erna's and Elizabeth's transportation to Iceland; and, finally, (4) Icelandair, the national airline of the Republic of Iceland, an alleged co-conspirator that supposedly transported Erna and Elizabeth to Iceland in knowing violation of Fred Pittman's custody rights.

Petitioners' claims in the courts below were based on state law and included: (1) tortious interference with parental rights; (2) conspiracy; (3) intentional infliction of emotional distress; (4) false imprisonment; and (5) negligence. Fred Pittman demanded $15 million in compensatory damages (plus punitive damages) from the defendants.

The three Icelandic individuals named as defendants allegedly were served with process, but they failed to appear and are in default.[2] Icelandair is the only defendant which appeared to answer Fred Pittman's claims.

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[2] Petitioners have not sought a default judgment against any of these individual defendants. The District Court agreed to grant a Fed. R.

B. Statement of Facts Relevant to the Issues Presented for Review

1. The Parties

Petitioner Fred Pittman is a citizen and resident of the State of Pennsylvania and claims money damages for himself and his daughter, Elizabeth, who still resides with her mother in Iceland. Respondent Icelandair is an Icelandic corporation which maintains its principal place of business in Reykjavik, Iceland. Icelandair is a privately owned international air carrier and the national airline of Iceland.

2. Undisputed Background Facts

By the stipulation of counsel, in a Joint Pretrial Order ("JPO") filed with the District Court, the following background facts were stipulated to by the parties:

> Plaintiff Fred Pittman married Erna and a child, Elizabeth, was born on March 23, 1982. JPO at 2, ¶ 1. Fred and Erna were divorced in 1986 and agreed to joint custody of Elizabeth; Elizabeth remained at all times with Erna. *Id.* ¶ 2.
>
> After Fred and Erna Pittman divorced, Erna had a child with, and married, James Brian Grayson. JPO at 5, ¶ 1. Their daughter, Anna Nicole Grayson, was born November 9, 1987. *Id.* Erna, Mr. Grayson, Elizabeth and Anna Grayson moved from California to Florida. *Id.* ¶ 2. Mr. Grayson and Erna separated in June of 1991 and Mr. Grayson immediately sought sole custody of his daughter, Anna. Tr. 36. In the course of Mr. Grayson's divorce and custody proceeding, he obtained a court order which barred Erna from removing Anna from north Florida. Tr. 37. [This court order was not put into evidence at trial.]

Civ. P. 54(b) certification to allow Fred Pittman to pursue an appeal to the United States Court of Appeals for the Second Circuit.

> On October 25, 1991, Fred Pittman brought a proceeding in the Okaloosa County Court in Pensacola, Florida, seeking sole custody of Elizabeth. JPO at 2, ¶ 3. In connection with this custody proceeding, the Okaloosa County Court issued a temporary injunction, on October 28, 1991, which barred Erna from removing Elizabeth from the geographic boundaries of the First Judicial Circuit of the State of Florida. *Id.* ¶ 4. [This court order was not put into evidence at trial.]

Erna disregarded the two Florida court orders entered in favor of Messrs. Pittman and Grayson when she left Florida with her two daughters. Of critical importance, however, no court order was ever issued directing Icelandair not to transport Erna and her daughters to Iceland and neither of the two court orders were ever served upon Icelandair. The only alleged "notice" given to Icelandair regarding Erna's anticipated departure from the United States were two telephone calls Mr. Grayson allegedly made to Icelandair's Orlando and Baltimore-Washington offices.[3]

3. The Nature of Fred Pittman's Claims Against Icelandair

Petitioner Fred Pittman claims that an Icelandair employee (Mr. Olav Ellerup, a supervisor within Icelandair's Passenger Service Department) intentionally engaged in a complex

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[3] Grayson could not identify, by name or title, any of the Icelandair employees with whom he allegedly spoke by telephone. Tr. 43, 50. He admitted that he never provided Icelandair with copies of the court orders restricting Erna's travel with her daughters or anything in writing regarding his request that Icelandair reject any request by Erna to travel to Iceland with her daughters. Tr. 50-51. He admitted that he never spoke with any Icelandair employee in New York. Tr. 51. The District Court acknowledged that a mere telephone call to an airline by a third-party could not itself create a duty on the part of the airline to prevent a passenger's travel. Tr. 298-301.

conspiracy to deprive him of Elizabeth. Specifically, Fred Pittman claimed that Ellerup:

- knew about the restriction on Elizabeth's travel;
- knew about Fred Pittman's custody rights;
- allowed Erna and her daughters to board Icelandair Flight 614 on May 1, 1992 under false names;
- intentionally entered incorrect weight and balance codes on the passenger manifest for Flight 614 to disguise the fact that a woman was travelling with two children; and
- escorted Erna and her daughters to an Icelandair aircraft departing for Iceland.

Ellerup and Icelandair denied each and every one of Fred Pittman's allegations and Pittman made no effort to bring Ellerup into this litigation as a defendant.

C. Trial in the District Court

A trial was held on February 24, 25 and 26, 1996 in the District Court before the Hon. John S. Martin and a jury. The jury returned a verdict awarding plaintiff Fred Pittman $7.5 million in compensatory damages and $2.5 million in punitive damages and plaintiff Elizabeth Pittman $2.5 million in compensatory damages and $2.5 million in punitive damages. Tr. 370-71. After the verdict was rendered, Icelandair moved for judgment and, alternatively, for a new trial.

D. The District Court's Decision Granting Icelandair Judgment as a Matter of Law

In a memorandum opinion and order entered on July 2, 1997, the District Court reviewed the trial evidence and concluded that Icelandair was entitled to judgment as a matter of law because "the evidence was not sufficient to justify impos-

ing liability on Icelandair for its role in transporting the plaintiff's daughter out of the country." Pet. 31a-32a.

As a matter of law, the District Court determined that, a "tortious interference with parental rights" claim under New York law required Fred Pittman to prove "that Icelandair, by the actions of its employee Ellerup, joined a conspiracy with, or aided and abetted, Erna Pittman to deprive her ex-husband of his lawful right to the custody of his child" *and*:

(1) that Ellerup/Icelandair were aware of the wrongful nature of her conduct and

(2) that Ellerup/Icelandair performed some act to further that unlawful purpose.

Pet. 37a.

The District Court properly concluded:

> [F]or Icelandair to be liable to the plaintiffs it is necessary for there to be proof not simply that it assisted her [Erna] in disguising the fact that she was leaving the country, but also that it knew the reason for this was that she was taking the children in violation of their father's rights. Because that proof is lacking, Icelandair is entitled to a judgment as a matter of law.

Pet. 40a.

E. The Second Circuit's Affirmance

In an opinion issued June 26, 1998, the Court of Appeals for the Second Circuit affirmed the District Court's grant of judgment as a matter of law to Icelandair, concluding: "there was inadequate evidence in this case [under New York law] to support the claim that Icelandair aided and abetted or conspired with Erna in interfering with parental custody." 149 F.3d at 118-119, Pet. 14a.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Question Presented for Review Was Not Addressed by the Courts Below

Petitioner Fred Pittman has presented only the following question for review by the Court:

> Whether federal law imposes on international airlines a "general duty to receive and transport . . . paying passengers," regardless of the fact that the passengers are openly travelling with tickets bearing false names, so as to entitle an airline that "intentionally assisted" the abduction of petitioner's daughter to overturn a $15 million jury award based on the airline's deliberate interference with the parent-child relationship.

This purported federal issue was neither raised nor decided by the courts below; they determined only that petitioner Fred Pittman failed to present sufficient evidence to support the New York *state law* claims set forth in the Amended Complaint. Fred Pittman never claimed in the courts below that Icelandair violated any federal law and never referred the District Court or the Second Circuit to the federal statutes and regulations (49 U.S.C. § 44902, 44909 and 14 C.F.R. § 243.7) which he now invokes and quotes at length on pages 2 and 3 of the Petition. Petitioners, having failed to assert the applicability of these federal statutes in the District Court, may not now rely on these statutes in seeking review by this Court. *See Duignan v. United States*, 274 U.S. 195, 200 (1927) (a grant of certiorari is precluded when the question presented was "not pressed or passed upon below").

These federal statutes and regulations have no relevance to this case and are presented to the Court for the first time in an attempt to manufacture a federal issue where none exists. 49 U.S.C. § 44902 relates to the rights of an airline to refuse

transportation to a passenger. The issue now raised by petitioners does not concern an airline's refusal to transport a passenger, but rather an airline's decision to provide transportation to passengers who held tickets. The cases cited by petitioners support the general proposition that, for good reason, a carrier, in its sound discretion, may deny a passenger transportation. However, a "denied boarding" question is not presented here. Likewise, the cases cited by petitioners support the general proposition that, *except* for certain circumstances also not present here, a carrier should transport passengers who have tickets. Critically, as the lower courts found, the carrier in this case was not served with any court order prohibiting the departure of the passengers, and no sound reason existed for the carrier to deny them transportation.

With respect to the other federal statute relied upon by petitioners, 49 U.S.C. § 44909 mandates that the Secretary of Transportation, no later than March 16, 1991, require carriers to record information about the passengers they board. However, the Department of Transportation did not promulgate the regulation as a final rule until 1997, well after the incident in this case. *See* § 14 C.F.R. § 243.7. Therefore, this statute and regulation also are not relevant to this case.

The District Court properly ruled that "the evidence was not sufficient to establish that Ellerup was aware of Erna Pittman's unlawful purpose to deprive her ex-husband of his lawful custody rights" and, therefore, Fred Pittman had failed to establish an essential element of the tort of interference with parental rights of custody. Pet. 34a-37a. The Second Circuit agreed with the District Court that "the notice element of concerted action was not established," Pet. 22a, and stated that "we cannot infer that the state courts would find that the knowledge element of such a claim was established [here]," Pet. 25a. Both decisions are fact-bound and dependent upon the evidence and an interpretation of New York law.

In his Petition, Fred Pittman fails to present an accurate statement of the facts and, instead, attempts to arouse this Court's interest with a fictional account based upon hearsay and attorney speculation formatted to manufacture a federal issue out of a basic state law claim.

Even the petitioners' rendition of the facts, however, establishes that this case is not appropriate for review. Petitioners' version cannot alter the fact that the decisions of the courts below are based upon petitioners' failure to proffer sufficient evidence to support a state law cause of action.

This Court has repeatedly stated that it will "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *See also Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1945) ("this Court cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error"). Accordingly, this case is an inappropriate candidate for review by this Court.

2. This Case Has No Significance Beyond the Private Interests of the Parties

Petitioner Fred Pittman has failed to demonstrate any "compelling reasons" for granting the Petition. The decisions below have no significance beyond the private interests of the parties and are so fact-based as to have little, if any, precedential value. *See Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) (concept of importance relates to the importance of the issues "to the public as distinguished from" importance to the particular "parties" involved). No "federal" issue is presented and no conflict has been shown between the decisions below and the decisions of other federal or state courts on a federal or constitutional question.

3. The Courts Below Properly Determined that Icelandair Was Entitled to Judgment as a Matter of Law

The courts below properly determined that Icelandair was entitled to judgment as a matter of law because "the evidence was not sufficient to justify imposing liability on Icelandair for its role in transporting the plaintiff's daughter out of the country." Pet. 31a-32a. There was no evidence in the record that Icelandair ever knew of Erna's intent to deprive Fred Pittman of his custody rights in violation of a Florida court order. *Id.*

The courts below simply determined that plaintiffs failed to prove the elements necessary to establish Icelandair's liability under New York law based upon the legal theory known as "tortious interference with parental rights." Specifically, plaintiffs failed to prove that Icelandair knew that Fred Pittman's ex-wife was acting wrongfully and, nevertheless, performed some act to further her unlawful purpose.

In sum, no significant legal issue has been presented by the Petition to warrant further review by this Court.

CONCLUSION

For these reasons, the Petition for a writ of certiorari should be denied.

Dated: July 2, 1999

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